Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

DUANE MONTGOMERY,

Petitioner,

v.

CITIBANK, NA,

Respondent,

On Petition for a Writ of Certiorari to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

DUANE MONTGOMERY
P.O. BOX 251242
W. BLOOMFIELD, MI 48322
(313) 550-2358

Petitioner In Pro Per

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Michigan District Court's General Practice or Policy of NOT Informing a party of the right to retain an attorney as required under Michigan Court Rule (MCR) 4.201(F)(2), (in an action to recover possession of real property), violates the Appellant-Petitioner's 5th and 14th Amendment Constitutional right of Due Process.

2. Whether the State of Michigan District Court's enforcement of an unsigned modified mortgage agreement in an action to recover possession of real property, violates the Appellant-Petitioner's 5th and 14th Amendment Constitutional right of Due Process.

3. Whether the State of Michigan District Court's denial of Jury Trial in an action to recover possession of real property, violates the Appellant-Petitioner's 5th and 14th Amendment Constitutional right of Due Process and Constitutional Right to Trial by Jury.

A LIST OF ALL PARTIES TO THE PROCEEDING

1. Plaintiff/Petitioner, Duane Montgomery, was a defendant in State of Michigan 48th District Court case 05-31871 (Citibank v Montgomery), held June 1, 2005. Plaintiff/Petitioner, Duane Montgomery, was not represented by an attorney or advised by the District Court that the Plaintiff/Petitioner had a right to retain an attorney.

2. Citibank, N.A., was the Plaintiff in 48th District Court case 05-31871 (Citibank v Montgomery), held June 1, 2005.

3. State of Michigan 48th District Court is the court that issued judgments against the Plaintiff/Petitioner in case 05-31871 (Citibank v Montgomery), held June 1, 2005.

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TABLE OF AUTHORITIES

Cases

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Other Authorities

14 James Wm. Moore, Moore's Federal Practice
83.20 (3d ed. 1997) 8

CITATIONS OF OPINIONS AND ORDERS ENTERED IN THE CASE

1. State of Michigan 48th District Court, Bloomfield, MI Order of judgment against Petitioner, Duane Montgomery, on June 1, 2005 after denying the Defendant-Appellant a Jury trial.

2. State of Michigan 48th District Court, Bloomfield, On June 21, 2005, the District Court issued an Order of Writ or Possession.

3. State of Michigan 6th Circuit Court, Order denying Stay pending Appeal Denied, June 22, 2005.

4. State of Michigan 48th District Court Officers execution of Writ on June 23, 2005.

5. State of Michigan Court of Appeals, Order Denying Application for Leave to Appeal, March 3, 2006

6. State of Michigan Supreme Court, Order Denying Application of Leave to Appeal, June 26, 2006.

JURISDICTON

NOW COMES DEFENDANT-APPELLANT-PETITIONER, DUANE MONTGOMERY, In Pro per, respectfully submits a Petition for a Writ of Certiorari, as authorized under U.S.C. Title 28, § 1257, for a review of the Order issued on June 26, 2006 by the Michigan Supreme Court in docket SC 130-751, Denying Application for Leave to Appeal. The State of Michigan Court of Appeals (docket 264952), Order Denying Application for Leave to Appeal, was issued on March 3, 2006. The State of Michigan 6th

Circuit Court, Order denying Stay pending Appeal Denied, and dismissal of appeal was issued August 18, 2005 for docket 05-DA8295 AV and August 24, 2005 for docket 05-DA8321 AV. The State of Michigan 48th District Court, Bloomfield, MI Order of judgment against Petitioner, Duane Montgomery, was issued on June 1, 2005 after denying the Defendant-Appellant a Jury trial.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall**

any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Trial in State of Michigan 48th District Court

1. On May 24, 2005, the Plaintiff-Appellee Citibank, N.A. filed a Summons and Complaint Termination of Tenancy, **(See Exhibit A1 and A2, Summons and Complaint)**.

2. The Summons states that "*you have a right to a jury trial*", **(See Exhibit A1, Summons)**.

3. On May 31, 2005, the 48th District Court received three (3) un-open envelops containing the Summons and Complaint, **(See Exhibit B1, B2, B3, Un-open envelopes containing Summons and Complaint)**.

4. On June 1, 2005, the Defendant-Appellant Duane Montgomery, filed a Jury Demand, motion to Quash or Strike and motion for summary Disposition.

5. Also on June 1. 2005, the Defendant-Appellant paid the $50 jury fee and a $20 motion fee, **(See Exhibit C, Jury fee receipt)**.

6. The Defendant-Appellant stated his answer and defenses on the record, **(See Exhibit D, Transcript of June 1, 2005 hearing, page 17)**.

7. On June 1, 2005, the District Court denied the Defendant-Appellant right to jury trial, **(See Exhibit D, Transcript of June 1, 2005 hearing, page 32)**.

8. During the June 1, 2005 hearing, the Defendant-Appellant notified the District Court that the Defendant-Appellant was not served with the Summons and Complaint, **(See Exhibit D, Transcript of June 1, 2005 hearing, page 23, line 1)**.

9. The District Court did not inform the Defendant-Appellant of the Defendant's Right to an Attorney as required under MCR 4.201(F)(2).

10. The District Court entered its judgment on June 1, 2005 after denying the Defendant-Appellant a Jury trial.

11. On June 9, 2005, the District Court held a hearing on the Defendant-Appellant's motion for stay pending appeal. The District Court denied Defendant-Appellant's motion for stay pending appeal, **(See Exhibit E, Transcript of June 9, 2005 hearing, page 9, line 19)**.

12. The Defendant-Appellant filed his Money claim and Counterclaims Complaint and Motion to move Counterclaim to circuit court on June 10, 2005.

13. On June 21, 2005, the District Court issued an Order of Writ or Possession.

14. On June 22, 2005, the Defendant-Appellant's motion for stay pending appeal in circuit court was heard. Plaintiff-Appellee claimed that the District Court granted the Defendant-Appellant's motion for stay, **(See Exhibit E, Transcript of June 22, 2005 hearing)**.

15. On June 23, 2005, court officers executed the Writ.

Appeal of Right to State of Michigan 6th Circuit Court

16. The State of Michigan 6th Circuit Court issued an Order August 18, 2005 for docket 05-DA8295 AV and August 24, 2005 for docket 05-DA8321 AV, dismissing appeal from District Court Order.

Appeal by Leave to State of Michigan Court of Appeals

17. The State of Michigan Court of Appeals' docket 264952, issued an Order dated March 3, 2006, Denying Application for Leave to Appeal.

Appeal by Leave to State of Michigan Supreme Court

18. The State of Michigan Supreme Court issued on June 26, 2006 in docket SC 130-751, an Order Denying Application for Leave to Appeal.

REASONS FOR GRANTING THE PETITION

The State of Michigan practice and procedures in actions to recover possession of real property that follow non judicial foreclosure proceeding violates the 5th and 14th Amendments of the U.S. Constitution.

The State of Michigan has a clear legal duty to Inform a party of the right to retain an attorney as required under MCR 4.201(F)(2) and under the standard set by this Honorable Court in **U.S. Supreme Court MIRANDA v. ARIZONA, 384 U.S. 436 (1966)**

The State of Michigan also has a clear legal duty to provide a Defendant with a Trial by Jury when requested as required under the State of Michigan Constitution and under the standard set by this Honorable Court in ***U.S. Supreme Court PERNELL v. SOUTHALL REALTY, 416 U.S. 363 (1974)***

The Petitioner has exhausted all adequate alternative remedy available. The Petitioner is challenging the **General Policy or Practice** of the State of Michigan's 48th District Court of failing to Inform a party of the right to retain an attorney as required under MCR 4.201(F)(2) in Summary Proceedings to Recover Possession of Premises. The authority of this Honorable Supreme Court to issue this Writ to compel judicial officers (of a lower court) to comply with mandatory legal duties, is derived from U.S.C. Title 28, § 1257

Relief Sought in Complaint for Writ

1. The Petitioner petitions this Honorable Court for a Writ Compelling the Judges of the State of Michigan 48th District Court to:

   A. Inform a party of the right to retain an attorney as required under MCR 4.201(F)(2).

Michigan Court Rule 4.201(F)(2)

*Right to an Attorney. If either party appears in person without an attorney, the court **must** inform that party of the right to retain an attorney. The court must also inform the party about legal aid assistance when it is available.*

Statement of the Issues Presented For Review

2. Whether the District Court Judges failed to perform a clear legal duty by failing to Inform a party of the right to retain an attorney as required under MCR 4.201(F)(2)

FACTS GIVING RISE TO MONTGOMERY'S CLAIMS FOR RELIEF

Facts Necessary to Understand the Issues Presented by the Petition

3. On June 1, 2005, the Plaintiff, Duane Montgomery appeared at a hearing for Summary Proceedings to Recover Possession of Premises. The Plaintiff was not represented by an attorney and the Trial Court failed to inform the Plaintiff of his right to retain an attorney as required under MCR 4.201(F)(2), (***See Transcript of Citibank v. Montgomery, App. D at 9a***). The Plaintiff's Application for Leave to Appeal to this Honorable Court was denied on June 26, 2006, (***See Order Denying Application for Leave, App. A at 1a***)

4. On August 11, 2004, Ms. Stacy Pencak appeared at a hearing for Summary Proceedings to Recover Possession of Premises. Ms. Pencak was not represented by an attorney and the Trial Court failed to inform Ms. Pencak of her right to retain an attorney as required under MCR 4.201(F)(2). (***See Transcript of Mortgage Electronic Registration v. Stacy Pencak, App. C at 4a***)

5. Review of both transcript clearly shows that the both District Court Judges failed to inform the Plaintiff and Ms. Pencak of their right to retain an attorney as required under MCR 4.201(F)(2).

CONCLUSION

6. To compel judicial officers to comply with mandatory legal duties, the writ or order of superintending control must be used. See MCR 3.302(C). "A superintending control order replaces the writ of mandamus when directed to a lower court or tribunal"

7. An action for superintending control may be proper to challenge a general practice of the lower court. *In re Lafayette Towers,* 200 Mich App 269, 271–72 (1993).

PLAINTIFF'S CLAIM

8. A local rule of a district court has the force of law, Somlyo v. J. Lu-Rob v Enterprises, Inc., 932 F.2d 1043, 1046 (2d Cir. 1991); see also 14 James Wm. Moore, Moore's Federal Practice 83.20 (3d ed. 1997), and the parties are charged with knowledge of the district court's rules the same as with knowledge of the Federal Rules and all federal law. Id. at 83.34. Fed. R. Civ. P. 83(b).

9. The Respondent, 48th District Court had a statutory obligation to inform a *party of the right to retain an attorney. The court must also inform the party about legal aid assistance when it is available.*

10. The Respondent, 48th District Court, has a General Practice or Policy of NOT informing parties of *the right to retain an attorney or inform the party about legal aid assistance when it is available.*

11. The District Court General Practice or Policy NOT to inform a *party of the right to retain an attorney or inform*

the party about legal aid assistance when it is available violates the Plaintiff-Appellant's due process rights.

WHEREFORE, Plaintiff-Petitioner, Duane Montgomery, respectfully request that this Court:

1. Issue a Peremptory Writ ordering Respondent State of Michigan 48th District Court to immediately discontinue the General Practice of NOT informing a *party of the right to retain an attorney or NOT inform the party about legal aid assistance when it is available.*

2. Order the Reversal of the Judgment against the Plaintiff-Petitioner Duane Montgomery and return possession of the Plaintiff-Petitioner's property.

3. Award costs to Plaintiff.

4. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

Duane Montgomery
P.O. Box 251242
W. Bloomfield, MI 48322
(313)-550-2358

Plaintiff Proceeds in *Pro Per*

APPENDIX A

STATE OF MICHIGAN SUPREME COURT DECISION

SC: 130751
COA: 264952

[Filed June 26, 2006]

CITIBANK, NA,
Plaintiff-Appellee,

v.

DUANE MONTGOMERY,
Defendant-Appellant.

ORDER

On order of the Court, the application for leave to appeal the March 3, 2006, order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. The motion to consolidate and the motion for sanctions are DENIED.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 26, 2006 /s/ Corbin R. Davis
Clerk

APPENDIX B

STATE OF MICHIGAN COURT OF APPEALS DECISION

Docket No. 264952
LC No. 05-008295-AV; 05-008321-AV

[Filed March 3, 2006]

CITIBANK, NA)
)
v.)
)
DUANE MONTGOMERY)
)

ORDER

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

The motion for leave to file a late answer is GRANTED.

The motion for leave to file a reply to the answer is DENIED.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

Mar 3 2006 — Date

/s/ Sandra Schultz Mengel — Chief Clerk

APPENDIX C

STATE OF MICHIGAN
IN THE 48TH JUDICIAL DISTRICT FOR THE COUNTY OF OAKLAND

District Court No. 04-32769 LT

[Filed August 11, 2004]

MORTGAGE ELECTRONIC REGISTRATION, Plaintiff,	)
vs.	)
MATTHEW PENCAK & STACY PENCAK, Defendant.	)

HEARING
BEFORE THE HONORABLE
KIMBERLY SMALL, DISTRICT JUDGE
Bloomfield Hills, Michigan
Wednesday, August 11, 2004

THE COURT: Calling the case of Mortgage Electronic versus Pencak, 04-32769.

MS. BALE: Good morning, your Honor. Heather Bale on behalf of Mortgage Electric.

THE COURT: All right. Today is the date and time scheduled for a hearing on termination of tenancy. Have you folks been able to resolve this?

MS. BALE: We have not. We have had an opportunity to discuss the matter and I think we're on the same page, but we have not entered into a consent judgment. This is a foreclosure following - I'm sorry - an eviction following foreclosure. The period of redemption expired in July and we're seeking termination of tenancy based on the sale, foreclosure of the property.

THE COURT: All right. Ms. Pencak, I need you to stand for just a moment. I need you to state your full name, please?

MS. PENCAK: Stacy Pencak.

THE COURT: All right. Ms. Pencak, if you'll raise your right hand.

Do you swear or affirm what you're about to testify to will be the truth?

MS. PENCAK: Yes.

THE COURT: All right. Tell me what is your defense to this? What's your position?

MS. PENCAK: I had a bad divorce and everything kept going wrong with the house and everything. I fell behind and right now, all I'm asking for is the possibly of 30 days instead of ten to get my daughter and I situated into a place to live.

THE COURT: All right. So certainly you don't dispute that they have a right to have you out of the residence?

MS. PENCAK: The only thing I would like is maybe to have 30 days instead of ten.

THE COURT: All right. Is she behind continually in rent?

MS. BALE: Again, it's not a rent. It's a foreclosure.

THE COURT: In the mortgage. It was a foreclosure. Tell me, what are your folks willing to do, if anything? Obviously, under the law, I have to follow the law. Ten days is what she's given. Are you folks willing to do anything else?

MS. BALE: Unfortunately, I don't have the authority to extend that period.

THE COURT: Ms. Pencak, let me ask you this. Do you have any money that you can pay them if they're willing, and I certainly can't make them, but if they're willing, can you pay them rent for the month?

MS. PENCAK: Yes, I can work that out definitely.

THE COURT: And how - anybody you can call to see if they will extend it? I know you don't have the authority and I certainly understand why.

MS. BALE: Yeah, I can do a proposal to see what they would accept.

THE COURT: All right. And then, of course, the rent would be paid immediately and if she failed to pay it and then the writ would issue within the ten days, under the law.

MS. BALE: Could you pass it for a few moments?

THE COURT: I'd be happy to.

MS. BALE: Thank you, your Honor.

THE COURT: Thank you. I'll pass this matter for a few moments.

Ms. Pencak, just go ahead and have a seat right there.

(Others matters were heard)

THE COURT: Recalling the case of Mortgage Electronic Registration versus Pencak, 04-32769.

MS. BALE: Thank you, your Honor. Heather Bale again on behalf of plaintiff Mortgage Electronic Registration. I did have an opportunity to talk to my client and unfortunately they are unwilling to extend the period.

THE COURT: Well, and it's certainly their decision, but thank you for making the effort. I appreciate it and I'm sure the defendant appreciates it.

Ma'am, what I'm going to need to do is, I'm going to enter the Judgment. You're going to have ten days and if you don't vacate in ten days, then I'll issue a writ and they then can evict you. Okay? Good luck to you.

MS. BALE: Your Honor, if I may, under the date of 8/23, ten days falls on a Saturday. That would extend it to the following Monday.

THE COURT: Okay, That's a good start. So it now gives you 12 days.

MS. BALE: May I approach?

THE COURT: Yes.

And Ms. Pencak, if you'll approach also for a moment.

(Bench conference off the record)

(Proceedings concluded)

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I CERTIFY that this transcript, consisting of seven (7) pages, is complete, true, and correct transcript of the proceedings and testimony taken in this case on August 11, 2004.

DATE: June 9, 2006

/s/

Sheryl Bonfiglio, CER 5825
Certified Electronic Reporter
4280 Telegraph Road
Bloomfield Hills, Michigan 38302
(248) 433-9300

APPENDIX D

STATE OF MICHIGAN
IN THE SIXTH JUDICIAL CIRCUIT COURT

No. 2002 185328 PH

[Filed August 21, 2002]

DUANE MONTGOMERY,
Plaintiff,

vs.

CITIBANK, N.A., a New Jersey Corporation
Defendant.

PROCEEDINGS
HELD BEFORE THE HONORABLE
DENNIS N. POWERS
in the City of Novi, Michigan
on Wednesday, August 21, 2002

Novi, Michigan
Wednesday, August 21, 2002,
At or about 9:52 A.M.

THE COURT: Calling the matter of Duane Montgomery versus Citibank North America. Appearances, please.

MS. CLARK: Michelle Clark appearing on behalf of Defendant Citibank. This is Defendant's Motion in Limine.

MR. MONTGOMERY Good morning, Your Honor. Duane Montgomery, the Plaintiff, is pro per.

THE COURT: All right. Your motion in limine, please.

MS. CLARK: Yes, Your Honor. I bring this motion in limine in response to a trial brief that I was served with last Friday, which I believe was the 19th - 16th, the 16th of August, as well as jury instructions that I was served with on the I believe 15th of August, both of which reference claims and causes of action not asserted in Plaintiff's Second Amended Complaint. The trial brief under Claims deals with nothing except claims for negligence, all - various kinds of negligence claims and breach of contract claims. The Second Amended Complaint that was filed by the Plaintiff in this case alleges only three causes of action, one being under the Michigan Consumer, Protection Act, subparagraph (bb), one under the Regulated Debt Collection Act under the state and one under Federal Fair Debt Collection Practices Act.

And I would like this Court to limit Plaintiff's causes of action to the causes of action that have been set forth in the Complaint, to limit his testimony to testimony relevant to those causes of complaint, and to limit the jury instructions proposed to the causes of action listed in the Second Amended Complaint.

THE COURT: And that's basically three causes of action, is that what you're saying?

MS. CLARK: That's correct, Your Honor.

THE COURT: All right. Mr. Montgomery, your response?

MR. MONTGOMERY: Yes, Your Honor. First, I would like to object to the Defendant's motion on the record as being untimely. The final pretrial order said – stated that those motions would be held on August the 14th and the Defense motion was on file after that date. There was a hearing at the Circuit Court on August the 14th, which the Defendant had a reasonable opportunity to present her motion at that time.

I'm not sure if you had an opportunity to review my response to the Defendant's motion, but with my response I also filed a Motion to Amend Evidence to conform to the evidence.

The Defendant refused to provide discovery last year. I filed a motion with the Court to compel discovery and that motion was granted on August the 14th of this year. The Defendant had till Monday, August 19th to provide the remainder of the discovery that I requested. The additional claims that I filed were based on the discovery that I received from the Defendant. The Defendant – the reason for the late filing of the additional claims is solely due to the Defendant's refusal to provide me with any discovery. As soon as I discovered that I had evidence and there was additional claims that I had to file, I filed them immediately after I received the discovery from the Defendants.

THE COURT: Did you ask for – or did you go to court and make a motion and ask for those dates to be extended?

MR. MONTGOMERY: The discovery was received after the dates that had passed.

THE COURT: Did you bring a motion before anybody relative to this fact that you wanted to add these – add this at a late date?

MR. MONTGOMERY: Yeah. I just filed a motion yesterday with the Circuit Court, which I dropped a copy off yesterday with your office.

THE COURT: This is a fact-pleading stage. You're going to be held to your pleadings, and that means that the Motion in Limine is going to be granted. You will not be allowed to introduce those items that you asked to be introduced; that is, the claim to bankruptcy, claim of additional contract violations, et cetera. This is a fact-pleading stage.

Anything further from either of you?

MS. CLARK: I would only respond, although it's not necessary, that the reason that I didn't comply with the court order regarding motions in limine is I was not served with the trial brief until after that date had passed.

THE COURT: Lot of problems. I'm going to indicate for the record we have a Plaintiff in pro per. Nothing will give him the right in a jury trial to have a narrative testimony because that prohibits objections because no one knows what is going to be said. Clearly, the Plaintiff will ask his own question. He will answer his own question. He'll be held to answers to those areas that he asks questions to. He cannot ramble on. Neither can your party ramble on. You ask specific questions. We'll have specific answers. Anything beyond that, if the Defendant objects, that objection will be granted. You'll have to ask your question, answer your question. Do you understand that? Mr. Montgomery?

MR. MONTGOMERY: Yes, Your Honor.

THE COURT: All right. Do you understand that?

MS. CLARK: I understand that, Your Honor. I would only ask – I believe that we discussed this off the record that the jury be informed prior to the start of trial of the method that Mr. Montgomery is going to use to present his case so that they don't think I'm badgering him.

THE COURT: I will so inform them.

MS. CLARK: Thank you, your Honor.

THE COURT: So how much time do you folks need before we're ready to go with opening statement?

MS. CLARK: I'm ready to go, Your Honor.

MR. MONTGOMERY: Your Honor, I just have a lot of equipment to set up to get my exhibits. I would like for 30 minutes to an hour to get things set up.

THE COURT: And why weren't you here this morning at 8:30 setting up?

MR. MONTGOMERY: I was, Your Honor, and the court clerk advised me to hold off on setting up.

MS. CLARK: He did, Your Honor.

MR. MONTGOMERY: Just in case this case was adjourned.

THE COURT: Are you going to need these before noon today, these items set up? Are they going – can you set up

during lunch hour? I don't want to take another hour of the jury's time.

MR. MONTGOMERY: They're my - display my exhibits, Your Honor. I can't present my exhibits.

MS. CLARK: There was no exhibit list filed. I'm a little curious as to what exhibits he's going to be presenting.

THE COURT: That's not the issue. The issue is did you present an exhibit list?

MR. MONTGOMERY: Yes, I did, Your Honor.

THE COURT: When did you present your exhibit list?

MR. MONTGOMERY: I filed it with the trial brief on August the 14th.

THE COURT: And your objection is?

MS. CLARK: My objection is that's not in compliance with the exhibit list requirement. That was in compliance with the court order stating stipulated exhibits would be numbered by that date and submitted to the Court. All other exhibits I believe were due in - I'm just guessing, but January or February in the Circuit Court, and at the very latest it might have been submitted with a witness list that was due at the end of June in the visiting judge's court. You know, because of the structure, there have been various dates; but certainly the order does not allow him to submit a three-inch exhibit list one week before trial, Your Honor.

MR. MONTGOMERY: Your Honor, I filed an exhibit list when we were with the other judge back in January last year

before this case was dismissed and it was reinstated, so the file does have my exhibit list and the exhibits were filed with the Complaint.

THE COURT: Did you get those exhibits?

MS. CLARK: I don't have them, Your Honor, but if he shows me that he did file an exhibit list timely, of course, I would withdraw my objection to any exhibits set forth in that exhibit list. However, I don't know what he's doing with this equipment over here. But I'm more than willing to allow anything if he does, in fact, have a – I do not have it in my file.

THE COURT: Do you have proof that you filed your exhibit list timely, sir?

MR. MONTGOMERY: Not with me now, Your Honor. All – I have . . . I have on my Plaintiff's Objections to Defendant's Amended Witness List and on my Plaintiff's Trial Brief which was filed on August 15th.

MS. CLARK: Your Honor, that's not an exhibit list.

THE COURT: No. We're asking – an exhibit list. Let's go back to the pretrial order which is all that we have to guide us over here.

MR. MONTGOMERY: Right.

THE COURT: It says a list of witnesses, experts. Let's see, motion in limine. Exhibits must be marked prior to the date of trial. Plaintiff shall use numbers . . . before trial is set.

Well, I'm looking at the final pretrial order; and where does it say that exhibits have to be filed by a particular date?

MS. CLARK: Your Honor, I was referring back to the Circuit Court orders prior to – only just – remanded is the wrong word. This was only moved to this docket from where this pretrial order came from in April, so the – what I'm saying is all the other – he filed a Complaint. He filed an Amended Compliant. It was dismissed on summary disposition. Filed a Second amended Complaint. There was a new scheduling order with new dates requiring witness and exhibit lists, and pursuant to that order, which if you give me time, I could probably find for you. I don't – he didn't file an exhibit list.

THE COURT: Let's look for that order because that order will determine whether he, in fact, will be entitled to have those exhibits.

(Off the record 10:03 A.M. to 10:05 A.M.)

THE COURT: This is in the Plaintiff's list. He filed a calendar conference order. That order before Judge Chabot, 7th day of November 2001. It is not legible.

A calendar conference order as ordered by Judge Chabot states that the exhibits must be filed and numbered at the same time or prior to the final pretrial order date, and that date given in the calendar conference order says May the 28th of 2002. It shall be prepared jointly by all parties. The Plaintiff shall have the primary responsibility for filing this pretrial order which shall contain the exhibit list. If I find that, then those exhibits will be allowed. If we didn't do that, then we have a problem.

So, Counsel, you're saying that there was no exhibit list filed with the final pretrial order on May the 28th?

MS. CLARK: I'm saying that I was not served and I have no knowledge of any having been filed.

THE COURT: All right. So he's given you no list of exhibits at all?

MS. CLARK: I was provided with a list of exhibits last week after the last hearing in front of judge –

THE COURT: But nothing prior to May the 28th of 2002?

MS. CLARK: No, Your Honor.

THE COURT: No?

MS. CLARK: No, Your Honor.

THE COURT: If that's so, you're not going to be allowed to introduce your exhibits, Mr. Montgomery.

MR. MONTGOMERY: Your Honor, most of the exhibits I did not even receive to after Defendant provided discovery.

THE COURT: Mr. Montgomery, you're the Plaintiff. This order says that you have the duty of putting together the final pretrial order which includes all exhibits. If, in fact, you can't agree on exhibits, then you bring them to the Court and say it. You cannot bring in exhibits today that you brought in yesterday. And you filed yesterday or last week. The order says they must be presented and filed on February – on May the 28th of 2002. Did you do that?

MR. MONTGOMERY: Yes, I did. Your Honor.

THE COURT: Show me the proof.

MR. MONTGOMERY: That's what I'm looking for, Your Honor. Your Honor, I don't have the hard copy and I don't have a copy of the docket statement, the docket sheet that would have that.

THE COURT: I have only what they've sent me from the Circuit Court and I've gone through that, and I find no filing in here of anything that you filed. I see no filing inside your trial brief or anything else that shows that you filed those things, that exhibits.

MR. MONTGOMERY: Your Honor, I would – since we're – since mot – since these files are at the Circuit Court I'm going to have to ask – because I can't present any exhibits, I have to ask for some type of adjustment so we can get those files from the Circuit Court.

THE COURT: Today's the day set for trial.

MR. MONTGOMERY: Your Honor, but this issues was not – I was not aware that this issue was going to come up because the Defendant never filed this order or challenged this order.

THE COURT: There's nothing to challenge until you try and move forward. She has – what's she going to challenge? You filed nothing. Show me a copy of the final pretrial order which you filed on May the 28th, on or before that date.

MR. MONTGOMERY: Your Honor, the final pretrial order was made by the visiting judge. We had a hearing with the

judge. I submitted all of my evidence and the judge wrote out the order right there in the courtroom.

THE COURT: That's the final pretrial order, but we're talking about this one in which you included in your brief which says that all exhibits are due by the 28th of May of 2002.

MR. MONTGOMERY: Right, Your Honor. When we met with the visiting judge, the date – the trial date was set for June. The judge said this order is no longer enforced because she's issued a new order.

MS. CLARK: That's not true.

THE COURT: I'm sorry. This order is in effect.

MR. MONTGOMERY: Your Honor –

THE COURT: Show me an order that says this order is no longer in effect.

MR. MONGTOMERY: The Defendant never complied with anything in this order. They never provided a witness list. They never pleaded discovery.

THE COURT: Sir, you're the Plaintiff. You have the duty of putting together the pretrial order. That's what this says. That's what Judge Chabot ordered. That's your duty. You want to be a Plaintiff, you have to follow what the judge said.

MR. MONTGOMERY: Yes, Your Honor.

THE COURT: The judge said that's what you have to do. My questions is, did you do it?

MR. MONTGOMERY: Yes, I did, Your Honor.

THE COURT: Show it to me.

MR. MONTGOMERY: Your Honor, I – all I have is the – all I – I don't have the documentation with me, Your Honor. I have to get it from the Circuit Court.

THE COURT: We're set to go to trial. I'm not going to let you run back to Circuit Court and present what you have. Did you read this order which you presented and this document to me?

MR. MONTGOMERY: Yes, Your Honor.

THE COURT: And what does it say? It says by the 28th of May. Show me a document that says this is no longer in effect or this has been changed by Judge Chabot.

MR. MONTGOMERY: Your Honor, this order was based on the trial date set for June.

THE COURT: Doesn't matter. It doesn't matter. It stays in effect unless you have another order which says that this order is no longer in effect.

MR. MONTGOMERY: Okay, Your Honor. Like I said, I filed – I filed the exhibit list.

THE COURT: When did you file the exhibit list?

MR. MONTGOMERY: Your Honor, I filed it twice. I filed in 19-- in 2000 and in 2001.

THE COURT: Okay. Well, the one in 2000 wouldn't count since there's an order of summary judgment throwing the case out.

MR. MONTGOMERY: Your Honor – okay, I'm not . . . Your Honor, but it was still part of the file. The file was re-opened. All that was still part of the same file. The exhibits that I'm submitted are the ones that were attached to the Complaint.

THE COURT: You show me. All I need from you is in the final pretrial order which we filed on May the 28th of 2002, that order shall be prepared jointly by all parties. Plaintiff shall have the primary responsibility for filing this final pretrial order and shall contain the following: The exhibits. Just show me that document and we go on. That's the only document I want to see.

MR. MONTGOMERY: Your Honor, I do not have the document with me now. It's at the court, at the Circuit Court.

THE COURT: Do you have a runner that can go up to Circuit Court and get that document for you?

MR. MONTGOMERY: Well, Your Honor, it would be me that would. No, I do not. I would go get it.

MS. CLARK: And for the record I wasn't served with it if he did file one, so I would ask that he also bring a proof of service if he's going to bring a copy of the exhibit list. That he bring a proof of service that's been filed with the court.

THE COURT: He'll have to do that. We'll stand adjourned. We'll stand adjourned to 1:30.

MR. MONTGOMERY: Your Honor, is it okay to leave the equipment here or do I need to move it?

THE COURT: Leave the equipment there and we'll see what happens. If I need to copy that pretrial order and this case will be finished on Friday. You're just using up half a day of valuable time by not being prepared, Mr. Montgomery. I need to see that order.

MR. MONTGOMERY: Thank You, Your Honor.

THE COURT: You will be – in fact, let's see. It gives you an hour, 11:20. We should – you should be able to be back here and set up to go if you have that final pretrial order. You should be back here by noon. You should be able to do that by noon, I would think.

MR. MONTGOMERY: Okay, Your Honor. I'm leaving now.

MS. CLARK: Opening arguments at noon, Your Honor?

THE COURT: No, we're going to do it at 1:30 because I can't keep the jury. What am I going to do? Send the jury to lunch at 10:30? I mean that's not fair to the jury. They're going to be under enough pressure.

(Momentarily off the record)

THE COURT: Calling the matter of Duane Montgomery versus Citibank North America. All right, Counsel.

MS. CLARK: Yes, Your Honor. I just wanted on the record the Court to address the order that I received from the Circuit Court signed by Chief Judge Young setting this matter, which was also scheduled for trial today, for a settlement conference

on October 4th and trial as soon as October 7th. It's my understanding that the Circuit Court has confirmed that we can go forward with trial today and that this won't be an appealable issue.

THE COURT: Right. Miss Renfrow, the Deputy Court Administrator, called over to Circuit Court. We're told that that's a general order that's issued for all cases that are outstanding and that that order does not apply to this case, and this case is to proceed to trial today.

MS. CLARK: Thank you, Your Honor.

THE COURT: That's what we were told.

(Off the record 10:22 A.M. to 2:03 P.M.)

THE COURT: Recalling the matter of Duane Montgomery versus Citibank North America. Appearances.

MS. CLARK: Michelle Clark appearing on behalf of Defendant Citibank.

MR. MONTGOMERY: Good afternoon, Your Honor. Duane Montgomery, the Plaintiff, in pro per.

MS. CLARK: Your Honor, I am happy to report on the record that we have settled this matter. The Plaintiff is going to put the settlement terms on the record.

THE COURT: All right.

MR. MONTGOMERY: Yes, Your Honor, we have come to a settlement. I have been informed by the Defendant that the outstanding mortgage balance of $529,069.58 will be financed

at a fixed rate of 7 percent over 27 years. Also, I will be allowed to retain the money that I have in Chapter XIII, which is approximately $16,000. The first mortgage payment will be October 1st, 2002.

Next is an amount of $48,137.86 and an additional amount of thirty-two dollars nine hundred eighteen - excuse me, let me back up - $32,918.51 will be financed at zero percent interest for 27 years as a balloon payment

Also under the standing - understanding that the Defendants will issue a note or a memo to the credit reporting agencies concerning that the debt was in dispute and that the dispute has been resolved. Is that correct?

MS. CLARK: Correct.

MR. MONTGOMERY: Is there anything else to add?

MS. CLARK: I'll just add a few things. The settlement - what this settlement is doing, Your Honor, is taking the current arrearage owed by the Plaintiff and splitting it in two, half of the interest arrearage being ballooned as the Plaintiff specified and half being added to his principle balance at seven percent fixed rate.

The other things that are included in this proposal is a waiver of all legal fees in the amount of $4,161.69, late charges of $5,161.44

Further, Plaintiff agrees to dismiss Citibank with prejudice and to sign a full release of claims as to Citibank, Advance Mortgage and Chase Manhattan Mortgage Corporation.

The Defendant does agree to report a dispute resolved in court with credit reporting agencies that have previously reported derogatory information with.

I think that is the extent of the settlement offer.

MR. MONTGOMERY: And I think, Your Honor, the only other thing is that I will not paying any court cost.

MS. CLARK: That is correct.

MR. MONTGOMERY: Or any other fees related to this lawsuit.

THE COURT: All right, Mr. Montgomery, if you'll raise your right hand. Do you solemnly affirm under penalties of perjury to answer all the following questions truthfully and fully to the best of your ability, so help you God?

MR. MONTGOMERY: Yes, I do.

THE COURT: All right. So you've heard the settlement which you've outlined in partial and which Miss Clark has outlined in partial. And basically the settlement is they're going to take the $529,069 and I think it was 68 cents?

MS. CLARK: 58.

THE COURT: Fifty-eight, five eight?

MR. MONTGOMERY: Yes.

THE COURT: And 58 cents. That will be financed at 7 percent over a 27 year period at a fixed rate.

There is $15,000 that the Plaintiff has placed in Chapter XIII, the bankruptcy court, to the trustee towards this obligation. That money will be returned to the Plaintiff.

The Plaintiff's first payment to Citibank North America will begin on October the 1st of 2002.

There are two outstanding issues. One is the interest rate of $48,137.86; was that correct:

MR. MONTGOMERY: Correct.

THE COURT: And the $32,918.51 which represented the back taxes. Those amounts will be capitalized. In other words, they will be put on a 27 year balloon at no interest rate.

The credit agency will be notified that the disputes have been resolved between the parties, and the Defendant will do this.

The Plaintiff will grant releases to the Defendant and to her other – and to all three entities which she represents and the Plaintiff will file dismissals with prejudice.

The Defendant further agrees to waive any legal fees. Defendant agrees to waive any late charges and also any costs associated with this matter.

Is that your understanding, sir?

MR. MONTGOMERY: Yes, Your Honor.

THE COURT: Miss Clark, is that your understanding?

MS. CLARK: It is my understanding, Your Honor. Would you like me to prepare an order?

THE COURT: Prepare and order and I will sign such an order.

MS. CLARK: Thank you, Your Honor.

MR. MONTGOMERY: Thank you, Your Honor.

THE COURT: Thanks, both of you.

MR. MONTGOMERY: And I apologize for taking the Court's time.

THE COURT: Well, you did the right – settlement was the right thing because this case, unfortunately not due to – entirely due to you was not really ready for trial.

MS. CLARK: Please thank the jury on my behalf, Your Honor.

MR. MONTGOMERY: Thank you, Your Honor.

THE COURT: Thank you. We stand adjourned.

(Proceedings concluded at 2:07 P.M.)

STATE OF MICHIGAN)
)
COUNTY OF OAKLAND)

I, Mary S. Rowland, Certified Electronic Court Recorder, hereby certify that the foregoing 22 pages are a full, true and correct transcript of the proceedings recorded by Rosemarie

L. Coleman, CER 2954, in the matter of Duane Montgomery vs Citibank, N.a., a New Jersey Corporation in the 52nd District Court in Novi, Michigan on Wednesday, August 21, 2002 before the Honorable Dennis N. Powers.

/s/ Mary S. Rowland
Mary S. Rowland
CER 1395

APPENDIX E

Michigan Court Rule 4.201(F)(2)

Right to an Attorney. If either party appears in person without an attorney, the court **must** inform that party of the right to retain an attorney. The court must also inform the party about legal aid assistance when it is available.